No. 90-495

In The

Supreme Court of the United States

October Term, 1990

MAGEE DRILLING COMPANY,

Petitioner,

versus

ARKOMA ASSOCIATES, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

ARGUMENT

MAY IT PLEASE THE COURT:

The larger part of respondent's opposition brief discusses a situation which does not exist in this case, to wit: jurisdiction to hear an intervention after the dismissal of the original claim. That situation is not present here. This

case, including the intervention, was tried by the District Court under the erroneous assumption that diversity jurisdiction existed among respondent and the defendants when in fact it did not. Therefore, authority relied on by respondent such as *Hunt Tool Company v. Moore, Inc.*, 212 F. 2d 685 (5th Cir. 1954) has no application here. The controlling authority here is this Court's opinion in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, 233 U. S. 157, 34 S. Ct. 550, 58 L. Ed. 893 (S. Ct. 1914) wherein it was held that the right to intervene presupposes the existence of a viable suit in which an intervention may be made. Such a suit did not exist in this case.

Absence of Diversity Jurisdiction Ab Initio

Respondent ignores the fact that the jurisdiction of a Federal Court is fixed at the commencement of a civil action as this Court held in *Smith v. Sperling, et al.*, 354 U. S. 91, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (S. Ct. 1957) relying on *Mollan v. Torrance*, 22 U. S. (9 Wheat.) 537, 6 L. Ed. 154 (S. Ct. 1824) in which it was held that:

> It is quite clear that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events.

If this rule is applied to the present case, it is clear that the District Court lacked jurisdiction *ab initio* in view of this Court's ruling in *Carden, et al. v. Arkoma Associates*, 494 U. S. ___, 110 S. Ct. 1015, 108 L. Ed. 2d 157 (S. Ct. 1990) which found that there was no diversity of citizenship among defendants and respondent, and that, therefore, there was no subject matter jurisdiction at the

commencement of this litigation. As a consequence, it follows that the discretion which the Court of Appeals found to have been exercised to allow Magee's intervention could not have been lawfully exercised in that a court without jurisdiction may not discharge any function including the exercise of its discretion.

In fact, the District Court did not exercise discretion to hear Magee's intervention as an independent suit after dismissal of respondent's original claim. The sequence of events relative to defendants' motion to dismiss for lack of diversity jurisdiction and Magee's attempt to intervene is as follows:

1. Suit filed May 23, 1985;
2. Magee's motion to intervene filed December 31, 1985;
3. Denial of Magee's motion to intervene by the magistrate entered January 30, 1986;
4. Defendants' motion to dismiss for lack of diversity jurisdiction filed February 10, 1986;
5. District Court's denial of defendants' motion to dismiss for lack of diversity jurisdiction and certification of question of jurisdiction to Court of Appeals for interlocutory appeal entered April 4, 1986;
6. District Court's reversal of magistrate's denial of Magee's motion to intervene entered June 26, 1986;
7. Court of Appeals' denial of defendants' application for interlocutory appeal entered September 18, 1986.

As set out above, Magee's motion to intervene had previously been denied at the time defendants filed their

motion to dismiss which is the reason why Magee did not join in the motion with defendants. Magee was not a party. It could hardly join in anything. It is therefore difficult to discern what significance respondent perceives in the fact that Magee did not join in defendants' motion to dismiss for lack of diversity jurisdiction (Opposition Brief page 2).

In denying defendants' interlocutory appeal, the Court of Appeals found that diversity of citizenship existed among defendants and respondent. No consideration of Magee's citizenship was involved in the determination of the jurisdiction pursuant to which the District Court tried this case.

Cases such as *Hunt Tool Company v. Moore, Inc.*, supra, cited at pages 5 and 13 of respondent's brief, wherein an intervention was allowed to survive the settlement of the original claim, are of no comfort to respondent in that jurisdiction to hear the original claim existed at the commencement of the suit.

Respondent's statement at page 6 of its brief in opposition that, "Magee does not dispute the fact that an intervenor can continue to litigate after the dismissal of the original action," asserts an irrelevant truism. As pointed out above, Magee did not continue to litigate in the District Court, in the absence of defendants, Carden and Limes, after dismissal of respondent's original claim. It was not until the case reached this Court that the absence of jurisdiction at the commencement of the action was determined. At that point, the time for an alleged exercise of discretion had long since passed, and in any event, was never exercised.

Both Magee and respondent cite *Simmons v. Interstate Commerce Commission, et al.*, 716 F. 2d 40 (D. C. Cir. 1983), an opinion written by Justice Scalia. Although language regarding intervention appears in *Simmons*, the cited case arose in an entirely different procedural context than the present case. There was no district court in *Simmons*. Instead, there was an administrative tribunal in which no intervention was filed by the labor union. Only after the case was on appeal did the labor union attempt to intervene. At that point there were three defects in the appellate intervention: (1) the labor union had not been a party in the administrative proceeding. (2) The parties appealing the administrative decision were not "aggrieved parties" as required by the statute under which the administrative proceeding was brought. (3) Since there was no proper appeal before the appellate court, there was no valid proceeding in which the labor union could intervene. Under such conditions, Justice Scalia wrote:

> . . . an intervenor lacking an independent jurisdictional basis cannot maintain suit where the court lacked original subject matter jurisdiction.
>
> The cases cited by IBT do not dispute this fundamental rule . . .

The "fundamental rule" to which Justice Scalia referred was that which would have required a district judge to exercise his discretion to hear an intervention after the principal demand had been settled or dismissed. At that juncture, the district judge would have considered whether the intervention could have been treated as a separate independent suit. That could never have happened in *Simmons*. (1) There was no intervention or participation by the labor union at the lower administrative

level. Therefore, there was no claim by the labor union which could have been heard as an independent action. (2) There was no district judge possessed of the power to exercise discretion had there been an intervention. In *Simmons* the intervention was not filed until the case was on appeal. An appellate court, Justice Scalia implied, could not exercise the discretion which might have been exercised by a district judge faced with a surviving independent claim after the original claim had been dismissed.

Clearly, Magee, the intervenor here, did not continue this action as the sole protagonist after dismissal of respondent's original claim. Dismissal came only after trial of both the principal action and the intervention on the mistaken assumption that the court had jurisdiction over the original action when in fact it did not. This case does not meet the conditions suggested by *Simmons*. Magee's intervention was tried as an ancillary matter appended to respondent's original demand, and the trial judge did not exercise discretion, one way or the other, respecting the intervention.

Requirements Necessary To Treat Intervention As Original Suit

This Court held in *United States Upon the Relation and for the Use and Benefit of Texas Portland Cement Company, et al. v. McCord*, supra, that:

> These rights to intervene and to file a claim, conferred by the statute, presupposes an action duly brought under its terms . . .
>
> Nor do we think that the intervention could be treated as an original suit. No service was made

> or attempted to be had upon it as required by the statute when original actions are begun by creditors. As we read the certificate, the intervention was what it purported to be – an appearance in the original suit, already brought, and in our view must abide the fate of that suit.

In its brief, respondent entirely misses the point of the absence of *Rule 4, Federal Rules of Civil Procedure* service of process. Magee does not contend that service of the intervention was invalid (as suggested by respondent), but that service was made only as is required *for a motion,* not as is required for a separate independent action. In the present suit, the intervention was not served on respondent pursuant to *Rule 4*. Therefore, according to *McCord,* it may not be treated as an original suit.

Nature of Magee's Intervention

At page 13 of its brief, respondent asserts that Magee did not specify whether it sought to intervene of right or permissively. This assertion is in error. As will appear from Magee's memorandum in support of its motion to intervene filed in the district court, a copy of which appears in the Appendix at page A-1, Magee sought intervention of right. In support of this position, Magee pointed out that it was the lessee of the equipment lease entered into with respondent as lessor, and therefore had an interest in the transaction at issue in the case. In any case, as the Fifth Circuit held in *Truvillion v. King's Daughters Hospital,* 614 F. 2d 520 (5th Cir. 1980) at page 526, no one may intervene in a defective suit, and it is irrelevant whether the intervention is permissive or unqualified.

CONCLUSION

The Court of Appeals errs in its belief that there exists discretion to treat Magee's intervention as a separate suit. Exercise of such discretion is proper only in those cases in which there is a an original basis for jurisdiction. As there was no valid basis for diversity jurisdiction at the beginning of this suit, there could be no validity to the District Court's order allowing Magee's intervention. Therefore, everything which occurred herein after defendants filed their motion to dismiss should be treated as null. As pointed out in Magee's application for certiorari, the Court of Appeals' own jurisprudence requires the existence of a suit within the jurisdiction of the District Court as a condition precedent to an intervention, *Kendrick v. Kendrick*, 16 F. 2d 744 (5th Cir. 1927) and its progeny. This was not present in this case.

This Court should grant Magee's application for certiorari, reverse the Court of Appeals for the Fifth Circuit, and dismiss Magee's intervention without prejudice.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ARKOMA ASSOCIATES	*	CIVIL ACTION
	*	
VERSUS	*	NO. 85-2295
	*	
C. TOM CARDEN AND LEONARD L. LIMES	*	SECTION "D"
	*	
* * * * * * * * * * * * *	*	MAG. DIV. 4

MEMORANDUM IN SUPPORT OF MAGEE DRILLING COMPANY'S MOTION TO INTERVENE

MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

The Statement of the case is contained in the Defendants' memorandum in support of their motion to amend their answer and counterclaim which is filed in conjunction with Magee Drilling Company's (hereafter "Magee") motion to intervene.

STATEMENT OF THE FACTS

The statement of the facts of this case is set out in defendants' memorandum in support of their motion for summary judgment.

ARGUMENT

Intervention is governed by Federal Rule of Civil Procedure number 24 which reads in pertinent part as follows:

> "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: ~~(1) when~~ a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . "

This rule was interpreted by the Fifth Circuit in the case of *Stallworth v. Monsanto Company,* 558 F 2d 257 wherein the trial court's refusal to allow plaintiff's intervention was reversed, the Fifth Circuit holding:

> From 558 F 2d 257 at page 268
>
> "Under Rule 24(a)(2) an individual is entitled to intervention as of right . . . [1] when [he] claims an interest relating to the property or transaction which is the subject of the action and [2] he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, [3] unless [his] interest is adequately represented by existing parties."

Since Magee is the lessee in the lease which Plaintiff seeks to enforce it has an interest in the transaction which is the subject of the action and hence has a right to intervene.

The defenses raised by Magee may be personal to Magee and yet reduce or eliminate the liability of defendants as Magee's guarantors. Such matters should be considered at the same time as the action filed by plaintiffs and disposed of in one suit rather than two or more.

CONCLUSION

The Court should grant Magee's motion to intervene.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all counsel of record by placing the same in the U. S. Mail, postage prepaid, this 31st day of December, 1985.

/s/ Richard K. Ingolia
RICHARD K. INGOLIA

PC1
ARKOMA2